

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
APPENDIX**

76-1462

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 76-1462

UNITED STATES OF AMERICA,

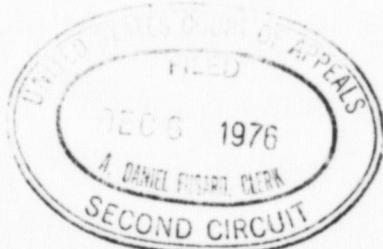
Plaintiff-Appellee

- against -

LAMONT FLOYD and PETER OLIVO,

Defendant-Appellants.

APPELLANTS JOINT APPENDIX



THOMAS J. O'BRIEN
Attorney for Appellant Olivo
Two Pennsylvania Plaza
New York, New York

PAUL E. WARBURGH, JR.
Attorney for Appellant Floyd
324 Park Avenue
Huntington, New York

PAGINATION AS IN ORIGINAL COPY

U.S. MAGISTRATE Assigned U.S.
207 1 0720
Date Set for Trial

86 CR 296

LAMONT FLOYD

Case No. 100-100000000000000000

Case Filed
Mo. Day
No. of Defts
1
JUVENILE
3

76-198
76 296
P.D.M.

U.S. ATTORNEY SECTION

18:2113(a)

OFFENSES CHARGED

ORIGINAL COUNTS

1

18:2113(d)

Bank Robbery
Bank Robbery and use of a dangerous
weapon

1

BEST COPY AVAILABLE

SEARCHED & SERIALIZED

INDEXED

ATTACHMENT

4/27/76

SUPERSEDING
COUNTS

TRIAL

SENTENCE

10/8/

6/3/76 X

6/3/76 X

6/3/76 X

MAGISTRATE	INITIAL NO.	OUTCOME
PLATT, J.		<input type="checkbox"/> DISMISSED <input type="checkbox"/> HELD FOR GO OR OTHER PRO- CESSING IN THIS DISTRICT
		<input type="checkbox"/> HELD FOR GO OR OTHER PRO- CESSING IN DISTRICT BELOW

ATTORNEYS

X (Initials) Name / Other L.P.C. Co.

Jonathan Marks

Paul Warburgh
324 Park Avenue
Huntington, N.Y. 11743
(516) 271-3546

OLIVO-2, KING-3

- 4/27/76 Before BARTELS, J.- Indictment filed
- 5/12/76 Petition for writ of habeas corpus ad prosequendum filed-issued
- 5-13-76 Before PLATT, J - case called - deft arraigned and after being advised of his rights and on his own behalf enters a plea of not guilty - 10 days for all motions - deft in custody - adjd to May 28, 1976 for status report.
- 5-14-76 Writ ret'd and filed - executed.
- 5-21-76 Before PLATT, J - case called - bail set at \$50,000 surety bond - defts motion for private investigator - motion granted, sum not to exceed \$300. Respectfully referred to to PRATT, J.
- 5-21-76 Petition for Writ of Habeas Corpus Ad Testificandum filed - Writ issued.
- 5-26-76 Writ ret'd and filed - executed.
- 5/28/76 Before PRATT, J.- Case called- defts not present-counsel present- case adjd to 6/21/76 for trial
- 6/1/76 Financial affidavit filed
- 6/1/76 By PLATT, J.- Order appointing counsel filed

EXCLUDABLE DATA

DATE	PROCEEDINGS continued	PAGE TWO	EXCLUDABLE DELAY			
			SEARCH INDEXED FILED	SEARCH INDEXED FILED	SEARCH INDEXED FILED	SEARCH INDEXED FILED
6-11-76	Notice of Alibi filed.					
6-15-76	Petition for Writ of habeas corpus ad testificandum filed. Writ issued.					
6-16-76	Writ retd and filed - executed.					
6-21-76	Before PRATT, J - case called - deft & counsel present - trial ordered and begun - Jurors selected and sworn - Govt opens - deft opens - trial contd to June 22, 1976					
6-22-76	Before PRATT, J - case called - deft & counsel present - trial resumed - Trial contd to June 23, 1976					
6-23-76	Before PRATT, J - case called - deft & counsel present - trial resumed - Govt rests - defts motion for judgment of acquittal - motion argued and denied - Trial contd to 6-24-76					
6-24-76	Before PRATT, J. - Case called. Deft & counsel present. Trial resumed. Deft rests. Govt rests. Trial continued to 6-25-76 at 9 A.M.					
6-25-76	Before PRATT, J - case called - deft & counsel present - trial resumed - Govt sums up - Deft sums up - trial contd to June 28, 1976					
6-28-76	Before PRATT, J - case called - deft & counsel present - trial resumed - Jury returns with a verdict of guilty on counts 1 & 2. Jury discharged - trial concluded - bail contd - sentence adjd without date.					
6-30-76	Voucher for expert services filed					
7-9-76	Stenographer's transcript dtd 6-25-76 filed.					
9-24-76	Before Pratt, J - case called - deft & counsel Paul Warburgh present - adjd to Oct. 1, 1976 for sentencing.					
9/28/76	Voucher for compensation for expert services filed.					
9-28-76	Stenographers transcript filed dated 9-24-76					
10-1-76	Before PRATT, J - Case called- Deft. and counsel P.E. Warburgh present. Case adj'd to 10-8-76 at 11:30 A.M. for sentence.					
10/8/76	Before PRATT, J.- Case called. Deft & Counsel present. Deft sentenced on cts 1 and 2 to imprisonment for a total period of 15 years. Court orders that the clerk file a Notice of Appeal in forma pauperis.					
10/8/76	Judgment & Commitment filed. Certified copies to Marshals & Probation.					
10/13/76	Notice of Appeal filed.					
10/13/76	Docket entries and duplicate of notice of appeal mailed to the Court of Appeals.					
10/22/76	Order received from the Court of Appeals that the record on appeal be docketed on or before October 27, 1976.					
11-10-76	Voucher for compensation for expert services filed					

X86 CR 296

APPEAL x 2071	COURT MAIL DATE ADDED	0720	Case Filed Mo Day	4 27	16-1987M
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DATE	PRICES (MOS) Cont'd	PAGE TWO	V. EXCLUDABLE DELAY			
			INTERVAL BETWEEN (a)	EXCL DATE END DATE (b)	CR CODE (C)	Total Days (d)
6-25-76	Before PRATT, J - case called - deft & counsel present - trial resumed - Govt sums up - deft sums up - trial contd to June 28, 1976					
6-29-76	By PRATT, J Order appointing counsel filed					
6-28-76	Before PRATT, J - case called - deft & counsel present - trial resumed - Jury retins with a verdict of guilty on counts 1 and 2 - jury discharged - trial concluded - bail contd and sentence adj without date.					
6-30-76	Voucher for expert services filed					
09-76	Stenographer's transcript dtd 6-25-76 filed.					
7/16/76	Voucher for Export or Other Services received & filed.					
9-24-76	Before Pratt, J - case called - deft & counsel present - adjd to Oct. 1, 1976 for sentence					
9-28-76	Stenographers transcript filed dated 9-24-76					
10/1/76	Before PRATT, J.- Case called. Deft & Counsel present. Deft sentenced on cts 1 & 2 under the Y.C.A. pursuant to T-18, U.S.C. Sect. 5010 (C) for treatment & supervision for a period of 10 years or until discharged.					
10/1/76	Judgment & Order of probation filed. Certified copies to Marshals & Probation.					
10/5/76	Notice of Appeal filed.					
10/5/76	Docket entries and duplicate of Notice of Appeal sent to the Court of Appeals.					
10/12/76	Draft of govts request to charge filed.					
10/12/76	Deft Floyd's request to charge (Exhibit B) filed.					
10/12/76	Court exhibits numbered 3 through 12 filed.					
10/12/76	Draft of Court exhibits filed.					
10/12/76	Form of verdict from jury after deliberation filed.					
10/12/76	Certified copies of Judgment & Commitment returned and filed. Deft delivered to MCC, NY.					
10/12/76	Record on appeal certified and mailed to the Court of Appeals.					
10-20 76	Acknowledgment receive from Court of Appeal for Record on Appeal					
10/22/76	Certified copy of Judgment & Commitment returned and filed. Deft delivered to FCI, Milan, Michigan.					
10/22/76	Order received from Court of Appeals that the record on appeal be filed on or before October 27, 1976.					

A-4

B

FD-350 (Rev. 1-25-64)
6761-531

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

- against -

LAURIE FLOYD,
PETER OLIVO and
MAVINE KING,

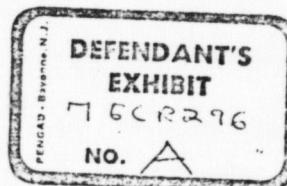
Defendants.

THE GRAND JURY CHARGES:

INDICTMENT

Cr. No. 76-CR-296
(Title 18, United States Code,
and 1(a) and 2)

4-27-76



COMING ON

On or about the 31st day of October 1975, within the Eastern District of New York, the defendants LAURIE FLOYD, PETER OLIVO and MAVINE KING knowingly and wilfully, by force, violence, and intimidation, did take from the person and presence of employees of the Chase Manhattan Bank, 1104 Fulton Avenue, Brooklyn, New York, approximately Eight Thousand Five Hundred and Ninety One Dollars (\$8,591.00), in United States currency, which money was in the care, custody, control, management and possession of the said bank, the deposits of which bank were then and there insured by the Federal Deposit Insurance Corporation. (Title 18, United States Code, Sections 2113(a) and 2).

A-5

CRIMINAL

On or about the 21st day of October 1970, within
the Eastern District of New York, the defendants, LAMONT FLOYD,
PETER OLIVE and XAVIER KING knowingly and willfully, by force,
violence, and intimidation, did take from the person and
presence of employees of the Chase Manhattan Bank, 1104 Putland
Avenue, Brooklyn, New York, approximately Eight Thousand Five
Hundred and Ninety One Dollars (\$8,591.00), in United States

currency, which money was in the care, custody, control,
management and possession of the said bank, the deposits
of which bank were then and there insured by the Federal
Deposit Insurance Corporation, and in commission of this
act and offense the defendants LAMONT FLOYD, PETER OLIVE
and XAVIER KING did assault and place in jeopardy the
life of the said bank employees as well as the lives of
other persons present by the use of a dangerous weapon.
(Title 18, United States Code, Sections 2113(1) and 2).

A TRUE BILL

FORTY-FIVE

DAVID G. SPAGER
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

A-6

ADDRESS REPLY TO
UNITED STATES ATTORNEY
AND REFER TO
INITIALS AND NUMBER

United States Department of Justice

UNITED STATES ATTORNEY

TRP:JMM:dms
F. #761,531

EASTERN DISTRICT OF NEW YORK
FEDERAL BUILDING
BROOKLYN, N. Y. 11201

June 1, 1976

Paul E. Warburgh, Jr., Esq.
Kassner & Detsky P.C.
122 East 42nd Street
New York, NY 10017

Re: United States v. Lamont Floyd
Docket No. 76 CR 296

Dear Mr. Warburgh:

Pursuant to F.R. Crim. P. 12.1(a), the Government hereby demands a written notice of your intention to offer a defense of alibi stating the specific place or places at which the defendant Lamont Floyd claims to have been at the time of the offense alleged in the indictment and the names and addresses of any and all witnesses upon whom the defense intends to rely to establish such alibi.

The bank robbery alleged in the indictment took place at the Chase Manhattan Bank, 1104 Rutland Road, Brooklyn, New York, on October 31, 1975, at approximately 10:15 A.M.

Very truly yours,

DAVID G. TRAGER
United States Attorney

Jonathan M. Marks

By: JONATHAN M. MARKS
Assistant U. S. Attorney

A-7

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
-----x

UNITED STATES OF AMERICA,

v.

LAMONT FLOYD,

Defendant.

NOTICE OF ALIBI

CRIMINAL NO. 76 CR 296

PLEASE TAKE NOTICE, that the above named defendant intends to offer a defense at the trial of this action that at the time of the commission of the crime charged he was at some place other than the scene of the crime, to wit: 497 Myrtle Avenue, Brooklyn, New York.

PLEASE TAKE FURTHER NOTICE, that the defendant intends to call the following witnesses in support of such defense:

1. Suqulia Manning,
C/O Kassner & Detsky, P.C.
122 East 42nd Street
New York, New York
2. Carla Dickerson,
Address unknown
3. Anthony Prince,
Address unknown
4. Louise Dickerson,
497 Myrtle Avenue
Brooklyn, New York

Dated: June 10, 1976

Yours etc.,

PAUL E. WARBURGH, JR.
Attorney for Defendant
Office & P.O. Address
122 East 42nd Street
New York, New York 10017
Tel: 212-682-6600

A-8

REQUEST NO. 1

ACCOMPLICE TESTIMONY

During this trial Xavier King testified against the defendant Paul. His testimony is inherently suspect for he may well have an important personal stake in the outcome of this trial. In so testifying he may believe that the acquittal of the defendants against whom he testified will destroy expected rewards that he may have been either explicitly or implicitly promised him in return for his testimony. United States v. Gonzalez, 488 F. 2d 833, 835-836 (CA2 1973); United States v. Padgent, 432 F 2d 701, 702 (CA2 1970). As a result, his testimony ought to be weighed by you with the very greatest care and caution and ought not to be passed upon by you under the same rules governing the other witnesses. United States v. Davis, 439 F. 2d 1105, 1106 (CA9 1971). See: United States v. Cataldo, 433 F. 2nd 38 41 (CA2 1970); United States v. Ploof, 464 F. 2nd 116, 119 (CA2 1972).

I further charge you as a matter of law that accomplices that are tankered with confessed criminality are often influenced in their testimony by a strong motive of hope of favor or of pardon, and, therefore, it is incumbent upon you to look carefully into the secret motive that might actuate bad minds to draw in and victimize the innocent. United States v. Murray, 445 F. 2d 1171, 1176 (CA3 1971).

REQUEST NO. 2

DEFENDANT'S TESTIMONY

The defendant objects to any instruction which specifically refers to a defendant's testimony. Courts have held that it is more preferable that the defendant's testimony not be singled out. See: United States v. Reid, 410 F. 2d 1223, 1227 (CA7 1969); Taylor v. United States, 390 F. 2d 278, 284-285 (CA8 1968).

However, the court overrules this objection, the defendant would ask that the following request be read to the jury.

In a criminal case, a defendant cannot be compelled to take the stand and testify. Whether he testified or does not testify is a matter of his own choosing. A defendant who wishes to testify, however, is a competent witness; and the defendant's testimony is to be judged in the same way as that of any other witness. Johnson v. United States, 318 U.S. 189, 195-196; Devitt and Blackmar, Federal Jury Practice and Instructions, Section 12.11.

REQUEST NO. 3

ALIBI

Evidence has been introduced tending to establish an alibi, which amounts to a contention that the defendant was not present at the time when or at the place where he is alleged to have committed the offense charged in the indictment.

If after consideration of all the evidence in the case, you have a reasonable doubt as to whether the defendant was present at the time and place the alleged offense was committed, you must acquit him.

The jury will always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

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1 THE COURT. Members of the jury:

2
3 We are now at the stage of trial where you are
4 about to undertake your final function as jurors.
5 Your duty is a serious and important one. In
6 performing it you actively share with me the
7 responsibility of administering justice according to
8 law and the evidence in this case. Your oath as jurors
9 obliges you to discharge this final task in an
10 attitude of complete fairness and impartiality -- and
11 as was emphasized by me when you were selected as
12 jurors -- without bias or prejudice, for or against the
13 Government or the defendants as parties to this
14 controversy. You must not permit yourselves to be
15 governed by sympathy or any other consideration which
16 is not founded in the evidence and in these
instructions on the law.

17 The case is important to the Government, since
18 the enforcement of the criminal laws is of prime
19 importance to the welfare of the community.

20 Obviously, it is equally important to the
21 defendants, who are charged with serious crimes and
22 have the right to receive a fundamentally fair trial --
23 the community has an interest in that too.

24 Let me add: The fact that the Government is a
25 party entitles it to no greater consideration than that

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2 accorded to any other party to a litigation.

3 by the same token, it is entitled to no less
4 consideration.

5 All parties, the Government and individuals
6 alike, stand as equals before the bar of justice.

7 In this charge I shall describe for you first
8 the general principles applicable to all criminal trials,
9 then the nature of the charges in this case, and then
10 the specific rules of law which are applicable to those
11 charges and something about the evidence which you have
12 heard, and finally something about how you should reach
13 a verdict.

14 Your final role is to decide and pass upon the
15 fact issues in the case.

16 You are the sole and exclusive judges of the
17 facts.

18 You determine the weight of the evidence; you
19 appraise the credibility of the witnesses; you draw
20 the reasonable inferences from the evidence.

21 My function now is to instruct you as to the
22 law, and it is your duty to accept these instructions
23 as to the law and to apply them to the facts as you
24 may find them.

25 With respect to any fact matter, it is your

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2 recollection, and yours alone that governs.

3 Anything that counsel, either for the Government
4 or the defense, may have said with respect to matters
5 in evidence -- whether during the trial, in a question,
6 in argument, or in summation -- is not to be
7 substituted for your own recollection of the evidence.

8 So, too, as to any matter in evidence, anything
9 that I may have said during the trial, or may refer to
10 during the course of these instructions, is not to be
11 taken in place of your own recollection. I have no
12 view of the guilt or innocence of these defendants.

13 The indictment is merely an accusation -- a
14 charge. It is not evidence of the defendants' guilt.

15 Since each defendant has pleaded not guilty,
16 the Government has the burden of proving the charges
17 against each defendant beyond a reasonable doubt.

18 A defendant does not have to prove his innocence.

19 On the contrary, each defendant is presumed to
20 be innocent of the accusations contained in the
21 indictment.

22 As to each defendant this presumption of
23 innocence was in his favor at the start of the trial;
24 it continued in his favor throughout the entire trial.
25 it is in his favor even as I instruct you now, and it

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2 remains in his favor during the course of your
3 deliberations in the jury room. It is removed only if
4 and when you are satisfied that the Government has
5 sustained its burden of proving his guilt beyond a
6 reasonable doubt. If the Government has failed to
7 sustain its burden, then the presumption of innocence
8 alone is sufficient to acquit him.

9 The fact that the defendants have been tried
10 together in one trial is a legal decision made by the
11 Court and is a fact beyond the control of the
12 defendants.

13 You are to draw no unfavorable inference
14 against the defendants or any of them because of the
15 fact that they were tried together in this trial.

16 Now, I have used the term reasonable doubt.
17 What is a reasonable doubt?

18 The words almost define themselves -- that there
19 is a doubt founded in reason and arising out of the
20 evidence in the case, or the lack of evidence.

21 It is a doubt which a reasonable person has
22 after carefully weighing all of the evidence.

23 Reasonable doubt is a doubt which appeals to
24 your reason; to your judgment; to your common sense
25 and your experience.

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2 It is not caprice, whim, speculation,
3 conjecture or suspicion; it is not an excuse to avoid
4 the performance of an unpleasant duty; it is not
5 sympathy for a defendant.

6 If, after a fair and impartial consideration of
7 all the evidence, you can, candidly and honestly, say
8 you are not satisfied of the guilt of a defendant --
9 that you do not have an abiding conviction of his guilt
10 -- in sum, if you have such a doubt as would cause you,
11 as prudent persons, to hesitate before acting in
12 matters of importance to yourselves, then you have a
13 reasonable doubt, and in that circumstance it is your
14 duty to acquit.

15 On the other hand, if after such an impartial
16 and fair consideration of all the evidence, you can,
17 candidly and honestly, say you do have an abiding
18 conviction of a defendant's guilt, such a conviction
19 as you would be willing to act upon, in important and
20 weighty matters in the personal affairs of your own
21 life, then you have no reasonable doubt, and under
22 such circumstances, it is your duty to convict.

23 One final word on this subject. Reasonable
24 doubt does not mean a positive certainty, or beyond all
25 possible doubt. If that were the rule, few persons,

2 however guilty they might be, would be convicted.

3 Since it is practically impossible for a person
4 to be absolutely and completely convinced of any
5 contraverted fact, the law in a criminal case is that
6 it is sufficient if the guilt of a defendant is
7 established beyond a reasonable doubt -- not beyond all
8 possible doubt.

9 Nor is it the Government's burden to prove each
10 and every bit of evidence to be true beyond a reasonable
11 doubt. Its burden is to prove beyond a reasonable
12 doubt each and every essential element of the crime
13 charged.

14 Reasonable doubt may arise from the failure of
15 the Government to produce evidence.

16 A defendant is not obligated to present
17 evidence in his favor. He had the right to rely on the
18 failure by the Government to prove its case. He may
19 also rely on evidence brought out on cross-examination
20 of witnesses called by the Government. On the other
21 hand, a defendant has the power to subpoena anyone in
22 support of his position if he so chooses, and he may
23 exercise that power, if he chooses.

24 I have used the terms "inference" and
25 "presumption."

2 An inference is a conclusion which reason and
3 common sense lead you to draw from the facts which
4 have been established by the evidence in the case and
5 it is the jury which may draw the inference.

6 A presumption is a conclusion which the law
7 requires the jury to make and continues only so long
8 as it is not overcome or outweighed by evidence in the
9 case to the contrary. But, unless and until the
10 presumption is outweighed by evidence, the jury is
11 bound to find in accordance with the presumption, for
12 example, the presumption of innocence to which I have
13 already referred.

14 Evidence is the method by which a disputed
15 fact is proved or disproved. Evidence is generally
16 classified as direct or circumstantial or indirect.

17 Direct evidence is the testimony of a witness
18 as to what that witness saw or heard, that is, what he
19 knows of his own knowledge.

20 Circumstantial or indirect evidence, however,
21 is where facts are established from which, in terms of
22 common experience, one may logically infer other
23 facts that are sought to be established.

24 For example, if you were to go outside after we
25 finish the trial this afternoon, or tomorrow or

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2 whenever it may be, and you see rain falling and you go
3 out and you feel it. That is direct evidence to you.
4 And if you were to testify, your testimony of it would
5 be direct evidence that it was raining.

6 If you were to stand downstairs in the hall
7 without looking outside closely enough to observe
8 whether raindrops were falling, and you would see cars
9 passing by with their windshield wipers going, that
10 would be a circumstance from which you could reasonably
11 infer that it was raining outside. If people come into
12 the Courthouse and there is water dripping off them,
13 they are shaking umbrellas or coming in with umbrellas
14 to the entrance of the door and closing them, those
15 are additional circumstances that you might reasonably
16 infer without ever looking outside that at that moment
17 it was raining outside. That is circumstantial
18 evidence.

19 What is the evidence in this case which you may
20 consider? It consists of:

21 Sworn testimony of witnesses regardless of who
22 may have called them;

23 Exhibits received in evidence regardless of who
24 may have produced them;

25 Facts which may have been admitted or stipulated

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What is not evidence?

3

The statements or arguments of counsel in opening,
summation, or made during the trial are not evidence.

4

Any statements I may have made are not evidence. Any
evidence which I have directed be stricken from the
record is not evidence. Any questions to which an
objection has been sustained is not evidence. And you
are not to speculate on what the answers might have been
had I permitted the answer.

11

Now I come to the nature of the charge.

12

The indictment in this case charges in Count
1 that the defendants Lamont Floyd and Peter Olivo on
October 31, 1975, together with Xavier King, knowingly
and willfully, by force, violence and intimidation,
took approximately \$3,591 in currency from Chase
Manhattan Bank in Brooklyn, which was in the custody
and possession of said bank, and that its deposits
were insured by the Federal Deposit Insurance
Corporation.

21

Count 2 of the indictment charges the same
robbery with the additional factor that the defendants
assaulted employees of the bank and other persons
present and placed their lives in jeopardy by use of a
dangerous weapon.

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2 As I said earlier, this indictment states the
3 charges against the defendants. It is not evidence
4 which you may consider as supporting their guilt.

5 The two counts of the indictment are based
6 Sections 2113(a) and (d) and Section 2 of Title 18 of
7 the United States Code. These sections state in part:

8 Subsection (a) states:

9 "Whoever, by force and violence, or by
10 intimidation, takes, or attempts to take, from the
11 person or presence of another any property or money or
12 any other thing of value belonging to, or in the care,
13 custody, control, management or possession of any bank
14 is guilty of a crime."

15 Subsection(d) states:

16 "Whoever, in committing, or in attempting to
17 commit, any offense defined in Subsection (a) of this
18 section, assaults any person, or puts in jeopardy the
19 life of any person by the use of a dangerous weapon or
20 device, is guilty of a crime."

21 The indictment also refers to Section 2 of
22 Title 18 of the United States Code, which states in
23 Subsection (a):

24 "Whoever commits an offense against the United
25 States or aids, abets, counsels, commands, induces or

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2 procures its commission is punishable as a principal.

3 That means that a person who aids in committing
4 a crime is just as guilty as the one who actually
5 commits it.

6 However, mere knowledge that a crime is being
7 committed, even when coupled with presence at the
8 scene, is generally not enough to constitute aiding
9 and abetting.

10 In order to aid and abet another to commit a
11 crime, it is necessary that the defendant in some way
12 associate himself with the venture, that he participate
13 in it as something that he wishes to bring about, that
14 he seek by his action to make it succeed.

15 The elements of the crime which must be
16 established before you can find either defendant guilty
17 on Count 1 are:

18 First: The act or acts of taking from the
19 person or presence of another, money belonging to or
20 in the care, custody, control, management, or possession
21 of a bank;

22 Second: The act or acts of taking such money
23 by force or violence, or by means of intimidation;

24 Third: Doing such act or acts willfully, and

25 Fourth: That the bank was insured by the

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2 Federal Deposit Insurance Corporation.

3 Count 1 requires proof of all these four
4 elements plus a fifth:

5 The act or acts of assaulting any person while
6 stealing that money, or putting the life of any person
7 in jeopardy by the use of a dangerous weapon while
8 stealing such money.

9 Each of the elements must be established
10 beyond a reasonable doubt.

11 Now, I will apply these elements briefly to
12 the evidence which has been presented to you.

13 In this case it is not contested that there was
14 a bank robbery -- that on October 31, 1976 three men
15 in masks entered the Chase Manhattan Bank carrying
16 guns, took approximately \$8,000 from the tellers, and
17 fled. The issue for you to determine is whether the
18 defendants or either of them was involved in the
19 robbery.

20 The first element required for proof under
21 Count 1 is the taking of money in the care of a bank.
22 If you find that the robbery occurred and that either
23 of these defendants participated in the robbery, then
24 this element is satisfied as to him.

25 (Continued next page.)

2 element is that of either assaulting any person or
3 putting the life of any person in jeopardy by the use
4 of a dangerous weapon while engaged in stealing money
5 from the bank. If you believe that any of the men who
6 took part in the robbery threatened the guard or other
7 people in the bank, or used a gun in the course of the
8 robbery, if you find that to be so beyond a reasonable
9 doubt, you may find that this element has been proved.

10 As I said before, you must also find whether
11 either or both of the defendants were among the persons
12 who did the acts involved. You must decide on all the
13 evidence whether the defendant Floyi or whether the
14 defendant Olivo, or both of them, took part in the
15 robbery.

16 Evidence has been introduced by each defendant
17 tending to establish that he was not present at the
18 time when or the place where he is alleged to have
19 committed the crimes charged in the indictment. If
20 after consideration of all the evidence in the case
21 you have a reasonable doubt as to whether a defendant
22 was present at the time and place the alleged offense
23 was committed, you must acquit him.

24 The Government must prove every element of the
25 crime charged beyond a reasonable doubt. If the

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2 Government fails as to any element, you must acquit.

3 The fact that one element of the crime may or
4 may not exist has no bearing upon any other element of
5 the crime charged.

6 You may not infer solely from the existence of
7 one element of the crime, if you conclude that the
8 element has been established, the existence of any
9 other element of the crime.

10 If any element of the crime has not been
11 established beyond a reasonable doubt, your verdict
12 must be not guilty. On the other hand, you must
13 convict a defendant if each of the elements of any
14 crime has been proved as to him beyond a reasonable
15 doubt.

16 A difficult aspect of any jury's duty is to
17 determine the credibility of the witnesses and to
18 weigh their testimony. In this case the problem of
19 credibility is one of the most critical problems.

20 The Government through its witnesses and other
21 evidence asserts that the defendants were two of the
22 bank robbers. Both defendants took the witness stand
23 and denied their participation; each of them stating
24 they were elsewhere at the time, and each of them
25 presenting evidence in support of his claim.

2 You, the jurors, are the sole judges of the
3 credibility of the witnesses. Credibility refers to the
4 believability of their testimony and the weight their
5 testimony deserves.

6 Your determination of the issue of credibility
7 very largely must depend upon the impression that a
8 witness made upon you as to whether or not he was
9 telling the truth or giving you an accurate version
10 of what occurred.

11 When you walk in the door of that Courtroom and
12 sit in the jury box, while the trial is going on, when
13 you are deliberating in the jury room, you have your
14 common sense, your good judgment and your experience
15 with you. You decide whether or not a witness was
16 straightforward and truthful; whether he attempted to
17 conceal anything; whether he has a motive to testify
18 falsely; whether there is any reason why he might
19 color his testimony.

20 In other words, what you try to do, to use the
21 vernacular, is to size a person up just as you would
22 do in any important matter where you were undertaking
23 to determine whether or not a person is truthful,
24 candid and straightforward.

25 Scrutinize the testimony given, and the

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2 circumstances under which each witness testified, and
3 every matter in evidence which tends to show whether a
4 witness is worthy of belief.

Consider each witness' intelligence, native and
state of mind, demeanor and manner while on the
witness stand. Consider his own ability to observe
the matters as to which he has testified, whether he
shall have impressed you as having an accurate
recollection of those matters.

Consider the relation which each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; the extent to which, if at all, each witness is either supported or contradicted by other evidence.

16 (Continued next page.)

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2 consideration the nature of the examination here, and
3 the purpose of the statement on the prior occasion.
4 You may take into consideration normal variations in
5 retelling an event to determine whether the statements
6 are truly inconsistent or merely a difference in
7 describing an occurrence.

8 It is for you and you alone to determine whether
9 an inconsistency is to a material or immaterial fact,
10 and what effect the inconsistency has on the witness'
11 credibility.

12 A witness, however, may be inaccurate,
13 contradictory, or even untruthful in some respects,
14 and yet be entirely credible in the essentials of his
15 testimony.

16 The ultimate question for you to decide in
17 passing upon credibility is:

18 Did the witness tell the truth here before you
19 as to essential matters in his testimony?

20 If you find that any witness -- and this applies
21 alike to Government and Defense -- willfully testified
22 falsely as to any material fact, you have a right to
23 reject the testimony of that witness in its entirety,
24 or you may accept that part or portion which you
25 believe to be credible.

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THE COURT: (Continuing.) Evidence that at some other time a witness has said or done something which is inconsistent with the witness' testimony at the trial may be considered by you for the purpose of judging the credibility of the witness. If adopted by the witness, that is, if the witness has admitted before you that he made the prior statement, it may also be used as cumulative evidence in the case.

You may also consider the failure of the witness to disclose information on prior occasions, when the opportunity to do so presented itself, as inconsistent with that witness' testimony here at the trial.

Whether a prior statement is inconsistent is
a fact question solely for your determination. You
also determine whether the failure of a witness to
reveal information prior to his testimony in Court
before you, for example, in reports or in statements
he may have made, you consider whether that is
inconsistent with his present testimony. In making
that determination you should consider all the facts
and circumstances attendant at the time of making the
prior statement or the omission of information. In
determining whether the prior statement is inconsistent
with the testimony given before you, you may take into

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2 The fact that some Government witnesses were
3 Government employees or police officers does not
4 entitle their testimony to any greater weight or
5 consideration than that afforded to any other witness
6 in the case.

7 You will evaluate their credibility the same way
8 you do that of any other witness.

9 The law never imposes upon a defendant in a
10 criminal case the burden or duty of producing any
11 evidence.

12 A defendant cannot be compelled to take the stand
13 and testify. Whether or not he testifies is a matter
14 of his own choosing. If he does choose to testify, and
15 the defendant Floyd and the defendant Olivo each did
16 in this case, he is a competent witness. In that event
17 he is subject to cross-examination, as you have
18 observed, and his credibility is for you, or the jury,
19 to determine, in the same manner as other witnesses.

20 You may consider that a defendant has a strong
21 motive to lie to protect himself, but you may also
22 consider that he takes a real risk in subjecting
23 himself to cross-examination and you must decide whether
24 to believe him or how much to believe.

25 Xavier King testified that he participated in

2 the crime charged. You have the right to suspect the
3 testimony of a participant in the crime charged if you
4 find that he has a personal stake in the outcome of
5 the trial, or if you find that he believes that the
6 rewards promised depend on the outcome of the trial.

7 Mr. King is not incompetent to testify because of
8 his participation in the crime charged. On the
9 contrary, the testimony of a participant alone, if
10 believed by you to be true beyond a reasonable doubt,
11 may be of sufficient weight to sustain a verdict of
12 guilty, even though not corroborated or supported by
13 any other evidence in the case.

14 You should keep in mind that the testimony of
15 a participant is always to be received with caution
16 and weighed with great care, and you should never
17 convict a defendant upon the unsupported testimony of
18 a participant unless you believe such unsupported
19 testimony to be true beyond a reasonable doubt.

20 Mr. King testified that four men were involved
21 in the bank robbery, himself, the defendant Floyd and
22 Olivo, and Edward Almestica. Mr. Almestica is not
23 available to testify in this case. You must disregard
24 his absence. And from it you may not draw any
25 inference whatsoever.

2 You will recall that both Mr. King and
3 Mr. Duffin admitted they had previously been convicted
4 of crimes. The testimony of a witness may be
5 discredited or impeached by showing that the witness
6 has been convicted of a felony, that is, of a crime
7 punishable by imprisonment for a term of years. A
8 prior conviction does not render a witness incompetent
9 to testify but is merely a circumstance which you may
10 consider in determining the credibility of the witness.
11 It is the province of the jury to determine the
12 weight to be given to any prior conviction.

13 The weight of the evidence is not necessarily
14 determined by the number of witnesses testifying on
15 either side. You should consider all the facts and
16 circumstances in evidence to determine which of the
17 witnesses are worthy of greater credence. You may find
18 that the testimony of a smaller number of witnesses on
19 one side is more credible than the testimony of a
20 greater number of witnesses on the other side.

21 If any facts permit inferences which are
22 equally consistent with guilt and with innocence, you
23 may not consider those facts as evidence of guilt.
24 But if you are satisfied from the evidence as a whole
25 that any defendant is guilty beyond a reasonable doubt,

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2 you should find a verdict of guilty.

3 At certain times in the trial the attorneys
4 mention "3500 material." That term refers to copies
5 of prior statements of its witnesses which the
6 Government, as required by law, had supplied to the
7 defendants' attorneys to use if they wished in
8 cross-examining those witnesses.

9 I have sought not to comment on the evidence in
10 any detail or to give any impression as to my own
11 view, if I have one, of the relative weight of the
12 evidence. If I have done so, however, I ask you to
13 disregard it entirely, because you are the sole judges
14 of the facts.

15 From time to time in the course of the trial
16 objections have been made and rulings on evidence
17 given. Draw no inferences from the comparative
18 frequency of objections of one or the other side or
19 from the comparative record in having objections
20 sustained. Where an objection to a question has been
21 sustained, disregard the question and draw no
22 inferences from its wording about the answer that might
23 have been given. Where an objection is overruled,
24 evidence then received has no special weight just
25 because it was unsuccessfully objected to.

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2 Under your oath as jurors, you cannot allow
3 a consideration of the sentence which may be imposed
4 upon a defendant, if he is convicted, to enter into
5 your deliberations, or to influence your verdict in
6 any way. In the event of a conviction, the duty of
7 imposing sentence rests solely with the Court.

8 Your duty is to decide the case solely upon the
9 evidence, to weigh the evidence in the case, and to
10 determine the guilt or innocence of the defendant
11 solely upon the basis of such evidence and these
12 instructions.

13 The verdict in each instance must be
14 unanimous.

15 Each of you, as jurors, is entitled to your own
16 opinion, but each of you should exchange views with
17 your fellow jurors.

18 That is the very purpose of jury deliberation--
19 to discuss and to consider the evidence; to listen to
20 the arguments of fellow jurors; to present your
21 individual views, to consult with one another; and to
22 reach an agreement based solely and wholly on the
23 evidence, if you can do so without violence to your
24 own individual judgment.

25 Each of you must decide the case for yourself

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2 after consideration with your fellow jurors. But you
3 should not hesitate to change an opinion which, after
4 discussion with your fellow jurors, appears to you to
5 be erroneous.

6 However, if after carefully considering all the
7 evidence and the arguments of your fellow jurors, you
8 entertain a conscientious view that differs from
9 others, you are not to yield your judgment simply
10 because you are outnumbered.

11 Your final vote must reflect your
12 conscientious view as to how the issues should be
13 decided.

14 The charge here is most serious.

15 The just determination of this case is important
16 to the public; it is equally important to these
17 defendants.

18 Under your oath as jurors, you must decide this
19 case without fear or favor and solely in accordance
20 with the evidence and the law.

21 If the Government has failed to carry its
22 burden as to a defendant, your sworn duty is to acquit.

23 If it has carried its burden as to a defendant
24 you must not flinch from your sworn duty -- you must
25 convict.

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2 If you wish to look at any of the exhibits, you
3 may ask for them.

4 If you wish to have some of the testimony
5 repeated, you may make the request and I will call you
6 into court and we will have read to you those portions
7 of the testimony which you desire to hear.

8 When you retire to the jury room, Kalish,
9 Juror No. 1, will act as your forelady and preside over
10 your deliberations. During your deliberations, you
11 should assume the attitude of judges of the facts
12 rather than partisans or advocates. In that way, you
13 will be making a high contribution to the administration
14 of justice.

15 You must report a verdict on both counts. You
16 may find either defendant guilty or not guilty on
17 either or both of the counts, and the verdict in each
18 case must be unanimous.

19 The marshal will be available outside the jury
20 room to report when you have reached a verdict or to
21 let the Court know if there are any questions which
22 you wish to have answered.

23 I have prepared a form of verdict on which your
24 forelady may record your findings.

25 When you have reached a verdict and are ready to

2 report, simply advise the marshal; but do not dis-
3 close to him what your verdict is. I will have your
4 forelady announce it orally back here in the Courtroom.

5 There will now be a short recess during which
6 counsel will review the charge with me to make certain
7 that nothing has been omitted or misspoken.

8 You may now retire to the jury room, but do
9 not discuss the case until I have brought you back
10 once more.

11 (The jury thereupon retired from the Courtroom
12 at 12:40 o'clock p.m.)

13 (The following occurred in the absence of the
14 jury.)

15 THE COURT: Any exceptions?

16 MR. O'BRIEN: The door is still open, your
17 Honor.

18 MR. WARBURGH: Your Honor, for the record, and
19 to preserve my rights on appeal, I would except to
20 the failure to charge my Request No. 1 in the language
21 which I indicated.

22 That is as to my requests for instructions.

23 As to the charge, in addition to my Request
24 No. 1, I object to your Honor mentioning to the jury
25 anything about the defendant's testimony and singling

11 1 it out.

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2 I except to the fact that you did not charge
3 the language that I suggested if you so chose to
4 single out defendant's testimony.

5 THE COURT: The language was in your Request
6 No. 2?

7 MR. WARBURGH: I think it was two.

8 THE COURT: Yes, it is No. 2.

9 MR. WARBURGH: I specifically except to your
10 Honor charging what is set out on Page 37 concerning
11 Mr. Almestica and the fact that they are not to draw
12 any inference from his absence here. That is it.

13 MR. O'BRIEN: I join in those exceptions, your
14 Honor.

15 THE COURT: Do you have any additional?

16 MR. O'BRIEN: No, I do not, your Honor.

17 THE COURT: Are there any --

18 MR. WARBURGH: Oh, just one. I would ask your
19 Honor to instruct the jury that the defendants did not
20 have a burden of producing any evidence whatsoever.

21 THE COURT: I believe I did say that. I do not
22 think I want to elaborate on it any further.

23 MR. WARBURGH, you will be leaving?

24 MR. WARBURGH: Very shortly.

25 THE COURT: As soon as the jury retires. Well,

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(The jury thereupon returned to the Courtroom

2 at 12:45 o'clock p.m.)

3 THE COURT: Miss Kalish, the clerk will hand

4 you the form of verdict to help you record the

5 conclusions which the jury will finally arrive at.

6 After you have reached your verdict, as I instructed

7 you before, you will come back into the Courtroom and

8 the clerk will inform you, Miss Kalish, as to what

9 your verdict is. In each instance you will simply

10 record orally as to each count and each defendant.

11 I understand that you already placed your order

12 for lunch. I believe that will be brought to you in

13 the jury room. I leave it to your own good judgment,

14 appetites, and inclinations as to your mixture of

15 deliberations and lunch.

16 Ladies and gentlemen, your oaths sum up your
17 duty -- and that is, without fear or favor to any man,
18 you will well and truly try the issues between these
19 parties according to the evidence given to you in Court
20 and the laws of the United States.21 We have fortunately reached the stage of the
22 trial with our original twelve jurors intact. I
23 therefore at this time excuse the two alternate jurors.
24 I thank you very much for your patience and attention
25 given to the case. You may not participate in the

A-40

16 1 deliberations with your twelve fellow jurors. You may,
2 if you wish, of course, remain and find out what the
3 outcome is. You are not obligated to do so. You are
4 free to go.

5 The Court informs you that you must first,
6 however, report downstairs to the central jury room
7 and they will give you further instructions.

8 I believe we have two marshals to be sworn.

9 (Marshals sworn by the Clerk of the Court.)

10 THE COURT: You may now retire to the jury
11 room.

12 (Thereupon, at 12:50 o'clock p.m. the jury
13 retired to the jury room.)

14 MR. O'BRIEN: Your Honor, off the record, do
15 we have the distinction of having tried the first
16 criminal case before you?

17 THE COURT: Number 2.

18 MR. O'BRIEN: Your Honor, I would like to say
19 that it has been a pleasure. I think my defendant
20 has gotten a very fair trial and I hope to work before
21 you again.

22 THE COURT: I would like to comment that all
23 three of you have done an excellent job. I understand
24 that both defense counsel were formerly U.S. Attorneys.

25 MR. O'BRIEN: That is correct.

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17 1 MR. WARBURGH: That is correct.

2 THE COURT: I am impressed by the ability of
3 all U.S. Attorneys that I have seen so far, and former
4 U.S. Attorneys.

5 MR. O'BRIEN: Thank you very much.

6 MR. WARBURGH: Thank you.

7 MR. MARKS: Thank you, your Honor.

8 THE COURT: I wish the defendants in this case
9 were present now. I think they have most ably been
10 represented.

11 MR. O'BRIEN: Thank you very much.

12 MR. WARBURGH: Thank you.

13 THE CLERK: Your Honor, when counsel gives me
14 the exhibits I will put them in the closet, lock them
15 in the closet. And just for your knowledge, when I
16 need them I will take them out.

17 MR. MARKS: And if you have any questions --

18 THE COURT: I will call you.

19 (A recess was thereupon taken from 1:00 p.m. to
20 2:00 o'clock p.m.)

21 (Continued next page.)

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A-42

MP/tk

1 MR. MARKS: I want to find out what was done in
2 response to the note.

3 THE COURT: All the exhibits have been given to
4 the jury.

5 MR. MARKS: They asked for three maps of Brook-
6 lyn and addresses of the defendants with respect to
7 street maps of Brooklyn. There is only one street map
8 of Brooklyn in evidence, that booklet and also the
9 charts.

10 THE COURT: Both of those have been given.

11 MR. MARKS: Anything given in response to the
12 addresses of the defendant?

13 THE COURT: They were given no information,
14 only exhibits.

15 MR. MARKS: I understand.

16 THE COURT: Mr. O'Brien, did you see the first
17 note from the jury?

18 MR. O'BRIEN: I understand it was the map, your
19 Honor.

20 THE COURT: There have been two notes.

21 MR. O'BRIEN: I'm sorry.

22 THE COURT: Mr. Marks, in your absence just a
23 moment ago, inquired as to what had been done. I
24 informed him all exhibits have been given to the jury.

25 MR. O'BRIEN: Fine, your Honor.

A-43

1 THE COURT: Mr. Marks asked what about the
2 request to the defendants' addresses and I informed him
3 that no information had been given to them other than
4 the exhibits. I waited until you gentlemen returned to
5 determine how we would answer that particular request.

6 MR. O'BRIEN: My suggestion would be in accord-
7 ance with the defendant's testimony.

8 THE COURT: The only testimony we have.

9 MR. O'BRIEN: Right.

10 MR. MARKS: We have some other evidence, evidence
11 of Xavier King. And the evidence of the Agent that he
12 lived at 343 Saratoga --

13 MR. O'BRIEN: I never heard that.

14 MR. MARKS: I will have to get my copy of the
15 transcript.

16 THE COURT: Can I suggest we bring them back and
17 read the jury whatever evidence there is pertaining to
18 the addresses of the defendants?

19 Jonathan, I will make one suggestion. We write
20 the jury a note and ask them if they want testimony of
21 the addresses of the defendants. If they say yes, Mr.
22 O'Brien and I will go through the testimony and find
23 all the relevant portions.

24 MR. O'BRIEN: No, I like to know what they mean.
25 They asked for the map, what they may be trying to do

A-44

1 is see where the defendants live in relation to 843
2 Saratoga.
3

4 THE COURT: We don't know.

5 MR. O'BRIEN: Possibly your Honor can call the
6 jury in and ask them what they are looking for.
7

8 THE COURT: All right.
9

10 MR. O'BRIEN: You can tell the jury the defendants
11 have testified and this is what their addresses
12 were. If that is what they are looking for, we will
13 give them that. If they have any questions about that,
14 whatever they want.
15

16 MR. MARKS: We can't give them the addresses of
17 the defendants. All we can do is give the testimony
18 on that issue.
19

20 THE COURT: Before we call them back, let's
21 prepare for it.
22

23 MR. MARKS: It will take me ten minutes.
24

25 THE COURT: Let me know when you are ready.
26

27 (recess taken at this time.)
28

29 MR. O'BRIEN: Your Honor, we have agreed upon
30 the pages. It's page 490 and 555 of the transcript.
31

32 What we have not agreed upon is the method that
33 we should give it to the jury. It would seem to me we
34 should give them the address, that is the only testimony
35 regarding the address -- and I believe Mr. Marks would
36

A-45

1 agree to have the testimony read --

2 MR. MARKS: Maybe I can talk for myself.

3 with respect to page 490, does your Honor have
4 that?

5 THE COURT: "Where were you? I was in a house
6 on 497 Myrtle Avenue."

7 MR. MARKS: Yes, and then following that. I
8 would ask that your Honor have read to the jury with
9 respect to questions concerning the defendant Floyd's
10 address lines 13 through 20 on page 490.

11 THE COURT: Any objection to that?

12 MR. O'BRIEN: Actually there is -- they ask for
13 the addresses of the defendants. If we wrote it on a
14 piece of paper --

15 THE COURT: Was there any other address?

16 MR. MARKS: Two addresses given, 49 and 497
17 Myrtle Avenue. That is the way I remember it. 497 was
18 a leading question by Mr. Warburgh --

19 THE COURT: Do you know anything about 497?

20 MR. MARKS: I don't know anything about 497.

21 MR. O'BRIEN: It seems clear what the jury is
22 looking for is a relationship between Saratoga and
23 Myrtle Avenues.

24 THE COURT: Right.

25 MR. MARKS: All the jury is entitled to is the

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1 evidence. They are entitled to all the testimony on
2 this point.

3 THE COURT: First we will find out what they
4 want to know.

5 MR. MARKS: They are not entitled to summaries
6 or --

7 THE COURT: All they want to know is what the
8 addresses are. I am not sure what I will do.

9 What is the other one?

10 MR. MARKS: 655 lines 21 through 22.

11 Your Honor, I can't think of any other way of
12 answering the jury's question when they ask for evidence.
13 All they are entitled to is evidence by giving them
14 exhibits or testimony.

15 MR. O'BRIEN: I leave it to the Court's discretion.

16 THE COURT: You have to.

17 Bring in the jury and let me see their note.

18 Do you have the note, Mr. Marks?

19 MR. MARKS: I have it here. There are only two
20 notes, is that correct?

21 MR. O'BRIEN: I waive the presence of the
22 defendant, although I am not sure I can.

23 MR. MARKS: I think they should be here.

24 THE COURT: Yes, bring them up.

25 (Pause.)

1 THE COURT: I think we have to read the testimony.

2 MR. MARKS: They asked for Mr. King's first test.

3 MR. O'BRIEN: They may want the grand jury

4 testimony. The only reference would be on 329.

5 THE COURT: We can't read the grand jury testimony.

6 MR. O'BRIEN: We have the minutes here in

7 cross-examination.

8 THE COURT: There may be a reference.

9 MR. MARKS: Yes, your Honor, you have to ask

10 them what they want.

11 Mr. O'Brien, 490, lines 13 through 20 for Floyd's,

12 are we in agreement?

13 MR. O'BRIEN: Yes.

14 THE COURT: Bring the defendants in and the jury.

15 (The defendants are present in the court room.)

16 (The jury is in the jury box.)

17 THE COURT: Ladies and gentlemen, we have
18 received from you now four notes and I want to take
19 inventory and provide you with whatever information you
20 requested.

21 The first note you sent in asked for one, pic-
22 tures; two, calendar, both; three, driver's license;
23 four, maps, both; five, bank diagram. I believe you
24 have received all of those, is that correct?

25 THE FOREMAN: Yes.

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1 THE COURT: The next note says street maps of
2 Brooklyn and the addresses of the defendants. Then all
3 pieces of evidence.

4 As to the street maps of Brooklyn, you have
5 received those. All pieces of evidence, I interpreted
6 that to mean all the exhibits which I directed to be
7 sent in to you.

8 The question of the addresses of the defendants
9 you gave us a further note on, and I will discuss it
10 in a moment.

11 The next one which I have, Mr. King's first test.

12 THE FOREMAN: Testimony.

13 THE COURT: Do you mean his direct testimony?

14 THE FOREMAN: Yes.

15 THE COURT: entire direct testimony?

16 You will have to have that read to you.

17 And Mr. Fleyd's statement as to where he lived.

18 His testimony as to where he lived, is that what you
19 are requesting? As to the addresses of the defendants
20 which you requested in the exhibit I marked Court
21 exhibit 4, Mr. Olivo testified, that was at page 655 --

22 MR. MARKS: On direct.

23 THE COURT: On direct testimony:

24 "Question: Where do you live?"

25 "Answer: 1548 East New York Avenue."

1 Mr. Floyd testified on direct , page 490:

2 "Question: Where were you?

3 "Answer: I was in my house on Myrtle Avenue,

4 49 Myrtle Avenue.

5 "Question: 497?"

6 "Answer: 497 Myrtle Avenue.

7 "Question: Is that your house?

8 "Answer: No, it ain't my house, it's my niece's

9 house, Valerie DiKenson."

10 I believe that is the testimony you wanted read
11 as to the addresses of the defendants. Is that correct?

12 Now, we have left the testimony, direct testi-
13 mony of Mr. King.

14 MR. MARKS: Starting at page 110, your Honor.

15 Your Honor, would you like me to mark off the
16 passages of colloquy and objected-to questions which
17 shouldn't be read or isn't that necessary?

18 THE COURT: You follow me along. If you think
19 I read something I shouldn't, say so.

20 With the Reporter's permission, I will read
21 back myself. Beginning at page 110, direct examination
22 by Mr. Marks.

23 (At this time the above-referred-to testimony
24 was read by the Court.)

25 THE COURT: That is the end of the direct exam-

A-50

1 ination of Mr. King. Is that all the testimony you wish
2 to have read at this time?

3 I ask you to retire and continue your deliberations.

5 (Jury left the court room.)

6 (continued next page.)

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2 (The following occurred at 5:15 p.m. in the
3 absence of the jury.)

4 MR. MARKS: Can we see the note, please? Can
5 we know what the note says?

6 (Document referred to was received and marked
7 Court's Exhibit 7.)

8 THE COURT: Mr. Marks and Mr. O'Brien, I have
9 a note here from the jury which has been marked
10 Court's Exhibit 7. This says the jury is deadlocked.
I can show it to you.

11 It is now ten minutes after five. I received
12 that note about five minutes of five.

13 What are your suggestions?

14 MR. MARKS: Well, I have two suggestions,
15 your Honor, first the Government would request an
16 Allen charge.

17 The second is, I would ask your Honor to
18 inquire of the jury whether there is any part of
19 your Honor's charge that the jury would like reread.

20 And alternatively, your Honor could reread
21 the entire charge.

22 MR. O'BRIEN: Your Honor, I would certainly
23 oppose your Honor rereading the charge. There is no
24 question that the jury has not requested that. I
25 would be opposed to an Allen charge. I normally

I am opposed to an Allen charge. I find it is coercive.
I do not think -- I am opposed to an Allen charge.

3 the jury has said they are deadlocked. I
4 would ask your Honor to discharge the jury and de-
5 clare a mistrial.

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MR. HARMS: I would vigorously oppose that application. It is much too early for that. After all this was a trial which lasted well over four trial days, four and a half trial days. They have been deliberating only since ten to one. It is now a quarter past five. It is much too early for the application for the declaration of a mistrial. I would request that your Honor ask the jury if they would like to have the charge reread, and if they think that would assist them.

16 MR. O'BRIEN: Your Honor, it is so clear in
17 this case --

18 MR. MARKS: Just a moment.

19 MR. GRIFFITH: I am sorry.

20 MR. MARKS: I would also ask your Honor to
21 give them an Allen charge.

22 MR. O'BRIEN: It seems so clear in this case,
23 your Honor, because it is not a complicated case,
24 that it is a question of credibility. I can see
25 the jury having a series of questions about the

1
2 credibility of the witnesses. It is not a complicated
3 case. It is not a question where the law is going
4 to -- there is an issue of law involved. It is clear
5 that the jury just has questions about the credibility
6 of both defense and prosecution witnesses. When they
7 say they are deadlocked I would say to me that is
8 exactly what they mean, that they are deadlocked.

9 THE COURT: I am not prepared to accept it
10 at this point, their simple statement that they are
11 deadlocked. What I will do is I will call them back
12 in and verify the note. I will urge them to return
13 and deliberate further. I will not indicate how long
14 I will hold them or whether I will bring them back
15 tomorrow, or Monday, or what.

16 For your own information very likely if they
17 have not reached a verdict by six o'clock or sometime
18 shortly thereafter, I will then decide whether or
19 not to give them an Allen charge, or require further
20 deliberations, or see what else has to be done.

21 MR. MARKS: Your Honor, once again I would
22 request that your Honor ask them-- to either repeat
23 your Honor's charge to them or ask them if they would
24 like it to be repeated. There are a number of difficult
25 points here. Probably one of the most difficult
points for the jury is how to deal with the absence

1 of Edward Glaestica. That was dealt with in your
2 Honor's charge in only three sentences. And I would
3 imagine that would be something that would trouble
4 the jury terribly.

5 THE COURT: Well, it may or may not.

6 I would ask them if a rereading of any portion
7 of the charge would be of assistance.

8 I may decide to reread the portion about their
9 deliberations.

10 MR. O'BRIEN: I don't know what portion that
11 would be, your Honor.

12 THE COURT: The very end as to they should
13 listen to each other and still make up their minds.
14 The chances are they listened to that too closely.

15 Bring the jury in.

16 (The jury therupon returned to the courtroom
17 at 5:15 p.m.)

18 THE COURT: Ladies and gentlemen, I have your
19 note which has been marked Court's Exhibit 7. It
20 says that the jury is deadlocked.

21 I assume by this that at this point you have
22 not been able to reach a unanimous verdict, is that
23 correct?

24 JUROR NO. 1: Yes.

25 THE COURT: I do not want to know from you

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1 and I do not want you to tell anyone what kind of
2 division there is amongst you, that is whether it is
3 eleven to one or six to six, or in what direction.
4 I would like to know, however, whether you feel there
5 is any possibility of reaching a unanimous verdict
6 as to either of the defendants on either of the two
7 counts by deliberating this matter any further.

8

JUROR NO. 6: I would say no, your Honor.

9

THE COURT: The case has involved up to this
10 point a considerable investment in time and energy.
11 You received it to deliberate on at about ten minutes
12 of one. Since that time until now, that is, 5:20,
13 you have had lunch. We have spent thirty to forty-
14 five minutes rereading back to you certain testimony.
15 I do not feel at this point that I can discharge you.
16 I'm going to ask you to return to the jury room and
17 to deliberate further. Only you know the points where
18 you are in disagreement. But I would ask you if any
19 one of the twelve of you think that a rereading of
20 any portion of the testimony or any portion of the
21 charge would assist you in resolving that disagreement.

22

None thinks that any part of it would help you?

23

JUROR NO. 3: We would have to discuss that.

24

THE COURT: Well, you will have an opportunity
25 to do so.

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2 If you think so, of course all you need to do
3 is ask.

4 I'm going to ask you, though, to return to
5 the jury room and continue your deliberations in an
6 attempt to arrive at a unanimous verdict.

7 Now at this time I will read to you a small
8 portion of the charge which pertains to your deliber-
9 ations. Possibly that may help you in arriving at
10 a unanimous agreement:

11 Each of you, as jurors, is entitled to your
12 own opinion, but each of you should exchange views
13 with your fellow jurors.

14 That is the very purpose of jury deliberation -
15 to discuss and to consider the evidence; to listen to
16 the arguments of fellow jurors; to present your indi-
17 vidual views; to consult with one another; and to
18 reach an agreement based solely and wholly on the
19 evidence, if you can do so without violence to your
20 own individual judgment.

21 Each of you must decide the case for yourself
22 and after consideration with your fellow jurors.

23 But you should not hesitate to change an opinion
24 which, after discussion with your fellow jurors, appears
25 to you to be erroneous.

However, if after carefully considering all the

1
2 evidence and the arguments of your fellow jurors,
3 you entertain a conscientious view that differs from
4 others, you are not to yield your judgment simply
5 because you are outnumbered.

6 Your final vote must reflect your conscientious
7 view as to how the issues should be decided.

8 I am going to ask you to return to the jury
9 room and continue your deliberations.

10 (The jury thereupon retired from the courtroom
11 at 5:25 p.m.)

12 THE COURT: Yes, Mr. Marks.

13 MR. MARKS: Your Honor, it is apparent from
14 the demeanor of the jury and from the response that
15 your Honor got from Juror No. 6 that an Allen charge
16 is going to be required.

17 MR. O'BRIEN: Your Honor, I did not see that --
18 any reaction from the jury at all. They said -- most
19 of them shook their heads when your Honor said would
20 a charge be helpful. One juror, I think Juror No. 4,
21 indicated to the Court that maybe they should discuss
22 it before reaching a decision.

23 THE COURT: Well, the mere fact that a juror
24 says we are not going to reach a verdict does not
25 mandate an Allen charge.

I will consider whether or not I wish to give

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such a charge. It is not required.

2

3 MR. MARKS: Of course, your Honor. But I would
4 request it.

5

THE COURT: Yes, I understand.

6

So we wait further action by the jury.

7

(Recess.)

8

(The following occurred at 5:45 p.m. in chambers.)

9

10 (Present: Mr. Marks, Mr. O'Brien, Helen
11 Weintraub, alternate juror No. 2.)

12

13 MR. MARKS: Your Honor, Mr. O'Brien and I were
14 talking to Mrs. Weintraub while the jury was deliber-
15 ating. She brought to my attention something which I
16 think the Court ought to know which would call for a
17 corrective instruction.

18

Mrs. Weintraub, could you please relate to the
19 Judge what you told me about what happened on Wednesday?

20

MRS. WEINTRAUB: Yes. Up until Wednesday we
21 were not escorted out of the courtroom into the ele-
22 vator. Wednesday evening we were escorted to the
23 elevator by one of the guards. And as we walked --

24

MR. MARKS: Can you identify that guard?

25

MRS. WEINTRAUB: I don't know his name. He
was a heavyset man with gray hair.

26

MR. MARKS: I think that would be Mr. Levy.

27

MRS. WEINTRAUB: As we were waiting for the

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that, and what we have on our hands right now is one or more jurors who are scared of rendering a guilty verdict.

I would ask your Honor to instruct the jury to the effect that they have nothing to fear. After all it is part of their oath that they are to render a verdict without fear or favor.

I would ask that your Honor elaborate on that.

MR. O'BRIEN: Your Honor, my feelings are that the defendants could very well be prejudiced by it also. Their fear that -- Mrs. Weintraub saying that no one was aware of the ropes -- I am willing to accept that -- that no one was aware, you know, of the ropes. But right from the beginning I had questioned in my mind that if the jurors got the impression that these were dangerous people or that they had anything to fear for themselves certainly that could prejudice the Government and it could equally prejudice the defendant. And it could work the exact opposite effect on certain people. Certain people may be afraid to give a not guilty verdict. Their feelings may be they would give a guilty verdict only because of that, or that they may be considering that fact. I don't know whether any of us can say actually what effect it would

14

1 have on the jury.

2 I would certainly be opposed to any instruction
3 because I think all that does is highlight the issue.
4 And I seriously think that possibly a mistrial is in
5 order, especially in view of the fact that the jury
6 has said they are deadlocked.

7 I would be very candid with your Honor and say
8 if the jury comes back with a guilty verdict, at this
9 time I would want to question the jury and hold a
10 hearing as to whether or not they were prejudiced by
11 being escorted from the building, or whether that
12 even entered into their deliberations.

13 THE COURT: We have been concerned with security
14 in this trial prior to its beginning. Having
15 the security creates inevitable problems as we know
16 throughout the trial. I believe even while we were
17 picking a jury, the suggestion of -- I think it was
18 of Mr. Marks -- I stopped asking the specific addresses
19 of prospective jurors and only asked them the general
20 location of where they lived to help eliminate or
21 minimize the potential threat to a juror. So the
22 matter has been of some concern. We have the problem
23 I believe on two occasions of jurors getting to the
24 front of the courtroom making telephone calls and
25 possibly seeing security arrangements which were made
there.

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2 I think it would be asking too much in an im-
3 perfect world to expect that the precautions which we
4 have taken which I think at least the United States
5 Attorney and I have felt were advisable under the cir-
6 cumstances -- is too much to expect that they could
7 be there and not be perceived in some way by the jurors.
8 It is quite obvious that we have at least three mar-
9 shals in the courtroom at all times. I do not think
10 the ones in the back of the court were quite that
obvious.

11 In the overall picture I do not think that the
12 incident which Mrs. Weintraub has described is signifi-
13 cant enough by itself to warrant the declaration of
14 a mistrial. It seems to me that it raised questions
15 in the jurors -- most of whom indicated they were
16 inexperienced with courtroom procedures -- they were
17 in an unfamiliar kind of situation. Two days they
18 had left the courtroom prior to Wednesday, and while
19 we had directed them to go around the back way, appar-
20 ently the marshal didn't give them any specific in-
21 structions at the elevator. And then the third day,
22 Wednesday, he said, "Everybody get on the elevator." And
23 I would assume that the jurors would have drawn
24 a conclusion from that that there was a reason why he
25 asked them to do so. I'm sure, being human and being

A-62

16

1 curious, that it might give them some thoughts, par-
2 ticularly after a day when the courtroom was -- I
3 think Mr. Weintraub was correct -- there were a fairly
4 large number of black people sitting as observers in
5 the courtroom which was different from what it was
6 the first two days.

7

These are things in a public trial you can't
control. But I do not think it rises to the level of
a mistrial, at least based upon what Mrs. Weintraub
said.

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I do not think it is fair to the defendants to
call the jury in and say, "Look, you don't have any-
thing to be afraid of here to bring in a verdict."
Obviously they are not afraid of the marshals or the
FBI. I'm afraid it looks more like strong-arming a
verdict. And I certainly do not want to do that.

What I will do at this point, in other words,
is nothing.

9/2

19

20

It is six o'clock now. I have decided that I

will not give an Allen charge.

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22

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25

I must feel in the context of this particular
case, partly for the reasons you mentioned, Mr. O'Brien,
that we are not dealing with a complex case. The
issue is quite clearcut. Either you believe King or
you don't. By reason of that, they may well be hung

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15

on this point-- you either believe him beyond a reasonable doubt or you don't believe beyond a reasonable doubt.

They have had now probably two and a half hours of good discussion. They did send out for cokes and cookies, and so forth, when I sent them back in. So I guess they intended to settle down to work. I think I will give them a reasonable period longer. And if they do not reach a verdict by then -- well, I will put it this way, I am not prepared to discharge them on my own motion at this time. But if a motion by the defense were to be made for a mistrial I would seriously consider it. I do not think anything would be gained by bringing them back on Monday, or by bringing them back tomorrow. I have pressured them. It is Friday afternoon on a summer's weekend. It is after six o'clock now. I am sure they have got families at home. There are some pressures urging them to reach a decision. If they do not reach it within the next half hour I am sure it is because there are conscientious differences of opinion.

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MR. MARKS: Your Honor, all of us have had many trials in which after a much longer period of deliberation the jury has sent notes out saying that they are at deadlock. And ultimately when given the

A-64

16 1 time to deliberate further they have been able to
17 2 render a verdict. I think, considering the amount
18 3 of evidence that has gone in in this case, a motion
19 4 by the defense for a mistrial at this early stage
20 5 would be terribly premature. And I would respect-
21 6 fully ask your Honor to have the jury come back to-
22 7 morrow to continue their deliberations in the event
23 8 that they are not able to render a verdict this
24 9 evening.

10 THE COURT: How late do you think I should hold
11 them this evening?

12 MR. MURKIN: Well, because it is Friday, and
13 I do not think I wish to coerce them, I think perhaps
14 until six-thirty, and then to continue their deliber-
15 ations tomorrow morning.

16 MR. O'BRIEN: I would be opposed to that. I
17 can see, your Honor, if you want to hold them to say
18 seven o'clock. There has not been much evidence in
19 this case. There is not a lot of evidence. The
20 real key issue is, as I think your Honor put it, on
21 the credibility of Mr. King.

22 And even speaking with the alternate juror,
23 she pretty much advises that she did not believe the
24 defendants or their girl friends.

25 She also indicated that prior to summations

1 that she probably would have voted guilty.

2 In summations I think we all harped on the
3 credibility of Mr. King. And I believe that is, you
4 know, where the issue lies. And it just seems clear to
5 me that if one person says I believe him and the
6 other person says I do not believe him, I do not see
7 how a person can change his mind on that. It is not
8 a question of weighing the evidence, or one juror
9 convincing another. Then it is a question of believ-
10 ability you either believe somebody or you don't.
11 And they can deliberate for five hours or five days,
12 and I think it remains the same.

13 MR. MARSH: It is actually more complicated
14 than that. Of course it is very difficult to come
15 at what the jury is thinking, what problems they are
16 having, simply on the basis of one alternate juror's
17 view of the case, but Mrs. Weintraub did tell us that
18 at least -- and I am not sure whether she said this
19 was her opinion or it was the opinion of her fellow
20 jurors, that there was grave concern on -- over the
21 fact that Edward Jimestica was not called as a wit-
22 ness. Everybody was wondering, even after your Honor
23 charged the jury as to his unavailability, where he
24 was, and why he wasn't called. And that was a big
25 problem.

13 THE COURT: Well, the problem in her mind is
14 a problem for you. I would say it is probably not
15 a problem for the defense. It is perhaps an advantage.
16 Although we don't know what would have happened had
17 we called him to the witness stand and let the show
18 go on as to his refusing or not refusing to testify
19 when I directed him to.

20 MR. MARKS: Would your Honor entertain a
21 request again that the Court reread the charge to
22 the jury?

23 MR. O'BRIEN: Your Honor, I think that it is
24 entirely improper to do so unless the jury requests
25 it.

26 In addition to that, in the light of recent
27 developments, with the possibility of fear involved,
28 I question whether the jury must think that Mr.
29 Almestica is not available because he may be dead or
30 injured. I don't know whether the jury is sophisti-
31 cated enough to realize that he may just have refused
32 to testify. And I do not think that --

33 THE COURT: Or can't be found.

34 MR. O'BRIEN: Or can't be found, that is true.
35 I hadn't thought of that possibility at the moment.

36 THE COURT: Well, the fact that both of you
37 seem to think you are prejudiced by the various events

1 we have been discussing here makes me think that
2 probably I should not take a drastic action based
3 on any of it.

7 MR. MARSH: I think it is much too early.

8 MR. O'BRIEN: I am not just talking about time.
9
10 If you talk about possible prejudice, I am not even
11 sure which side is prejudiced. I wish I knew which
side is prejudiced.

14 MR. O'BRIEN: Well, not necessarily, because I
15 think -- I would not want the jury believing -- if I
16 were a defendant I wouldn't want the jury believing
17 I am a dangerous enough person to have them injured.
18 I think it might very well push me the other way and
19 say that if I have to worry about fear there is no
20 question that these people are guilty, and then out
21 of a sense of duty I think I would come to the conclu-
22 sion that I have to convict them because they are
23 definitely guilty because now I am in fear of some-
24 thing happening to me. If they were innocent I would
25 have nothing to fear.

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1
2 THE COURT: We don't know that much about any
3
4 of the jurors and never will.

5 I think we will just let them do their duty
6 up there for a little while longer at least and let's
7 see what happens.

8 MR. O'BRIEN: Yes, your Honor.

9 THE COURT: They may reach a verdict; they may
10 not. And then we may have to do something. I cer-
11 tainly will not hold them today beyond seven o'clock.

12 MR. O'BRIEN: Yes, sir, thank you.

13 THE COURT: They are not to know about that.

14 MR. O'BRIEN: Of course not.

15 MR. MARKS: Thank you for seeing us in chambers
16 Judge.

17 THE COURT: Very good.

18 (Recess.)

19 (After recess.)

20 (The following occurred at 6:58 p.m. in open
21 court in the absence of the jury.)

22 (Document was received and marked Court's
23 Exhibit 8.)

24 THE COURT: Gentlemen, at about a quarter to
25 seven, and it is now two minutes of seven, I received
another note from the jury which has been marked
Court's Exhibit 8. It says: "The jury is dead-
locked."

21

(Documents received and marked Court's Exhibits)

9 and 10 respectively.)

THE COURT: Shortly after that the marshal
gave me a sheet of paper, which is now in two parts,
marked Court's Exhibits 9 and 10, and it is written
requests by various jurors to call various people
and tell them that they are going to be a while.

I took the liberty of asking the law clerks
9 to make telephone calls without calling you back into
10 session. They have all been made except two people
11 who weren't at home.

At this point I am going to call the jury back
and ask them once again if -- I will ask them whether
they have made any progress. And let's see what their
answer is.

16 MR. O'BRIEN: Your Honor, in the event that
17 the jury indicates that they do not think they can
18 reach a verdict, I would definitely move for a mis-
19 trial for the reasons I have already related.

20 MR. MARKS: Your Honor, this may take a while --
21 let me just see if I can articulate my thought.
22 This has been really an emotionally charged day for
23 this jury. We started about nine o'clock with loads
24 of summations, mainly by the Government, and then
25 your Honor's charge. And about at ten to one they

went into the jury room. In fact they had lunch in
the jury room which we can assume took forty minutes
or so. So as a practical matter they haven't been
deliberating all that long. They started deliberat-
ing, say, at one-thirty. They ordered coffee and
cake at one point. Considering the amount of evidence
and the emotion charge of the day I think it . . . too
early to grant the defendants' request for a mistrial.

Earlier in chambers I had asked your Honor
to consider bringing the jury back tomorrow. I think
that perhaps the better course is to dismiss the jury
for the evening and to ask them to come back Monday
morning when they are well rested and ask them to
give another try.

I have had many trials in this courthouse,
your Honor, in which jurors, even in similar simple
cases, have taken much longer to reach a verdict than
in this case. It is not at all uncommon for a jury
to take as long as fourteen hours to reach a verdict.
And while I frequently have heard of premature motions
for a mistrial as the jury comes in with a note to the
effect that they are deadlocked, those motions are
generally not granted until the jury is given an
adequate opportunity to reach a verdict. They haven't
been at this that long at this point.

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23 1 So once again I would just request that your
2 Honor discharge the jury for the evening and ask them
3 to come back on Monday morning. If at the end of the
4 day on Monday at a reasonable hour, if they haven't
5 been able to reach a verdict then your Honor can
6 consider a motion for a mistrial.

7 THE COURT : They will have to return on Monday
8 in any event because their jury service is not con-
9 cluded. The question is whether they ought to convene
10 here for their deliberations or go back to the jury
11 vault --

12 MR. O'BRIEN: Well, it would seem to me --

13 MR. MARKS: If I may just say this, what harm
14 really is there in having them continue their deliber-
15 ations on Monday?

16 THE COURT: There is potential harm possibly.
17 No one knows possibly how the jurors' mind works.
18 Certainly I could keep them in there with the air
19 conditioning turned off and the temperature would
20 reach 80 degrees. If I kept them there at night late
21 it would be like forcing a confession out of them.
22 It is not just the way the system works. It is not
23 fair to the jury to compel an agreement from them.

24 I have instructed them, and I believe I have
25 instructed them if they sincerely believe this is the

1 best judgment, "I am not certain it is fair to say
2 you have got to change your judgment, whether I say
3 it in words or otherwise, and say you have got to come
4 back tomorrow or Monday, or whatever. I think what
5 I would like to do, and I have considered everything
6 you have said, Mr. Marks, and what you have said,
7 Mr. O'Brien, many other things, and I think I will
8 call them back and try to determine from the jury
9 whether any further deliberations on Monday would
10 be of assistance to them.

11 MR. MARKS: Your Honor, I am not sure that the
12 jury is in the proper frame of mind to make an evalua-
13 tion of that sort at this point because not only
14 have they been subjected to emotional summation --

15 THE COURT: Just a moment.

16 (Jury note sent into the courtroom.)

17 THE COURT: "Direct and cross-examination of
18 Floyd Olive."

19 MR. MARKS: So there we have it. That cer-
20 tainly supports --

21 THE COURT: I think there is no alternative.
22 I will call them in and I will excuse them to convene
23 Monday morning.

24 MR. O'BRIEN: Your Honor, may I have an affi-
25 davit of engagement --

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1 THE COURT: There is no way that they can stay
2 an hour or an hour and a half to read the direct and
3 cross-examination of both witnesses. I suspect the
4 jury knows that too. That is why they have requested
5 it at this point. However we must assume the request
6 is made in good faith.

7 MR. GIBBON: Yes, your honor.

8 THE COURT: I will call them in and dismiss
9 them until Monday morning.

10 MR. O'NEILL: Your Honor, may I have -- well,
11 we can do this later -- but I would like an affidavit
12 of engagement. I'm scheduled to start a trial by
13 Monday. Thank you.

14 THE COURT: Maybe Mr. Warburgh can come in for
15 you.

16 Bring the jury in.

17 (The jury thereupon returned to the courtroom
18 at 7:07 p.m.)

19 THE COURT: Ladies and gentlemen, first off
20 I have your requests to make certain phone calls. I
21 had my law clerks make those phone calls. And with
22 two exceptions they reached the parties that you
23 requested and informed them that you would be leaving
24 the courthouse in the vicinity of seven o'clock.
25 The two that they did not reach were "Call Ray,

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26 say now is delayed" and "Brenda" is the name. That
2
is one. And the other is the request to call Kathleen
3
McCormick.
4

5 (Document referred to was received and marked
6 Court's Exhibit 11.)
7

8 THE COURT: Now I have your request, Court's
9 Exhibit 11, requesting that the direct and cross-
10 examination of the defendants Floyd and Olive be read.
11 We will not do that this afternoon.

12 I considered bringing you back tomorrow but I
13 think that you have already put in enough time and
14 energy in this case. It has been a long day. It
15 wouldn't be fair to you, perhaps not to the attorneys
16 and other people involved in the case. That would
17 require you to give up a Saturday as well. You have
18 to come back next week for the remainder of your jury
19 term. So we will recess until nine o'clock Monday
20 morning, at which time the testimony which you requested
21 will be read to you.

22 Now, we are going to have a weekend. It is of
23 even greater importance now that you are in your de-
24 liberations that you not discuss this case amongst
25 yourselves or with anyone else from now until the time
you come back to the courtroom to hear that testimony
read and then retire for further deliberations. Even

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when you come back here on Monday morning and you are waiting to be called into the courtroom, do not discuss the case amongst yourselves until you've come back and hear this testimony and get back into the jury room for further discussion. That is very important. I urge you to follow my instructions in that regard. So you have heard a lot of talk today. You are not going to hear any more. You are excused until nine o'clock Monday morning.

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JUROR NO. 3: Sir, I think we have got a problem also. We had a discussion after that note was sent in and we came up with a deadlock decision.

THE COURT: Well, I think I have your request. Someone within the last ten minutes or so has requested that this testimony be read. I think we will proceed as I instructed and we will see you here Monday morning at nine o'clock. Thank you very much.

(The jury thereupon retired from the courtroom at 7:10 p.m.)

MR. O'BRIEN: Your Honor, I think that the fear that your Honor expressed that the note could possibly be a sham and they just wanted to force the Court into -- the Court and defense counsel and the prosecutor -- to get them go tonight -- is true. It seems apparent to me that that note was not sent out in good

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22

1 faith, the fact that they are deadlocked again.

2

I renew my motion for a mistrial.

3

THE COURT: Well, at this time, Mr. O'Brien,

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I will deny the motion.

5

As I said, the jury does have to come back on
6 Monday morning anyway. It is not a severe imposition
7 on them. If they are still deadlocked after they have
8 heard the testimony read then obviously there is very
9 little that can be done.

10

MR. O'BRIEN: Very well.

11

THE COURT: We have already -- I did not give
12 the Allen charge. But there is nothing in it which
13 is contrary to fact, the heavy stake involved both of
14 a financial and emotional nature that have already
15 been invested in the case, the hours involved in the
16 case. And I do not believe that it should result in
17 compelling a decision out of the jury. They are
18 relieved of the responsibility over the weekend. They are
19 will get another shot at it Monday morning. If it
20 doesn't work then I will entertain a motion for a mis-
21 trial.

22

MR. O'BRIEN: Yes, your Honor.

23

THE COURT: Thank you very much, gentlemen.

24

(Thereupon at 7:15 o'clock p.m. an adjournment
25 was taken -- Monday, June 28, 1976 at 9:00 o'clock p.m.)

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1
2 UNITED STATES DISTRICT COURT
3

4 EASTERN DISTRICT OF NEW YORK
5 -----
6

7 UNITED STATES OF AMERICA, :
8 Aggrieved : 76-CR-296
9

10 LAMONT FLOYD and RUTH OLIVO, :
11 Defendants.
12 -----
13

14 United States Courthouse
15 Brooklyn, New York
16

17 June 26, 1976
18 10:00 o'clock A.M.
19

20 Before:
21

22 HONORABLE GEORGE C. PRATT, U.S.D.J.
23

24

25

JOSEPH BARBIERA
OFFICIAL COURT REPORTER

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1
2 Appearances:

3

4 DAVID G. TRAGER, ESQ.
United States Attorney
5 for the Eastern District of New York

6 BY: JONATHAN MARKS, ESQ.
7 Assistant U.S. Attorney

8

9 PAUL WARDURCH, ESQ.
Attorney for Defendant Floyd

10

11 THOMAS O'DRILL, ESQ.
12 Attorney for Defendant Olivo

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(The following took place in the absence of the

100

July 1963

1

THE COURT: Well, with respect to the Allen charge, you objected to it on Friday, Mr. O'BRIEN.

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MR. O'BRIEN: I did.

6

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MR. O'BRIEN: Your Honor, which would your Honor intend to use this - if I agree to have it used?

14

THE COURT: I really haven't got to the point of determining that. If there is a point at which you gentlemen can agree it would be used, I will use it at that point.

10

MR. O'BRIEN: May I have two minutes to confer with Mr. Barbush?

91

THE COURTS. — Surely,

9

(Whereupon, Mr. O'Brien and Mr. Warburgh confer privately.)

13

MR. O'BRIEN: Your Honor, I would withdraw my objection to a watered-down Allen charge. I still think that the Allen charge as originally stated in

1 United States against Allen is somewhat too coercive or
2 coercive and I feel a watered-down version would remind
3 them of their responsibilities without having any
4 prejudice to the defendant.

5 MR. MARKS: I agree.

6 THE COURT: I understand that both Judge Wadler
7 and Judge Peeling have a form of watered-down Allen
8 charge. I will ask my law clerk to run those down and
9 look them over while the testimony is being read.

10 MR. MARKS: I don't think --

11 THE COURT: Before I give it, I will see if you
12 have any objection to it.

13 MR. O'BRIEN: Yes, your Honor.

14 MR. MARKS: I would like to put my position on
15 the record. It is simply that I don't think the jury
16 should be given an Allen charge until they have a rea-
17 sonable amount of time to deliberate, until they have
18 heard the testimony.

19 THE COURT: Oh, I would agree with that. We will
20 read them the testimony and then give them an hour or
21 so.

22 MR. MARKS: I think the record should show that
23 the Court has corrected the transcript on page 603, line
24 14. It now reads:

25 "Have you ever used any other name?

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1 The witness holds no.

2 Question: Peter Archilda?

3 Answer: Yes.

4 Is that a correct version?

5 THE COURT: That's with the agreement of all
6 Counsel?

7 MR. WARMBURG: Yes.

8 THE COURT: Mr. Reporter, that's what it looks
9 like when you get to it. If you get to it. I may do
10 it.

11 All right, all we need is the defendant.

12 (Records taken.)

13 (Whereupon, the defendants entered the court
14 room.)

15 THE COURT: Gentlemen, are we ready to go?

16 MR. O'BRIEN: Yes, your Honor.

17 MR. MARKS: Yes, your Honor.

18 THE COURT: All right, bring in the jury.

19 (Whereupon, the jury entered the court room.)

20 THE COURT: Good morning. I hope you enjoyed
21 the weekend.

22 Well now, pursuant to your request, we will have
23 read to you the direct and cross examination of the
24 defendants, Lamont Floyd and then Peter Olivio. The
25 Reporter is going to read Mr. Floyd's testimony. I

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1 read Mr. Olivo's. That way no one's vocal chords will
2 be unduly taxed.

3 All right, Mr. Reporter.

4 (Whereupon, the direct and cross-examination of
5 the defendant, Lamont Floyd, was read.)

6 THE COURT: All right, that concludes Mr. Floyd's
7 testimony.

8 MR. MARKS: 655, your Honor.

9 THE COURT: This will be the direct testimony of
10 Peter Olive.

11 (Direct testimony of defendant Peter Olive read
12 by the Court.)

13 THE COURT: That concludes the direct examination
14 of Mr. Olivo. Cross-examination by Mr. Marks.

15 (Record read.)

16 THE COURT: And then we skip ahead to page 674,
17 line 23.

18 (Record read.)

19 THE COURT: We go forward to page 679.

20 (Record read.)

21 THE COURT: Redirect examination by Mr. O'Brien.

22 (Record read.)

23 THE COURT: That concludes Mr. Olivo's testimony.

24 Now, ladies and gentlemen, we have read back to
25 you as you requested the testimony of both the defend-

(Recent taken.)

THE COURT: You have seen the note?

6 MR. MARSHALL, Mrs.

15 THE COURT: Surely,

16 One jury note marked as Court exhibit 12.

17 MR. QUINN: I have no objection to the changes.

18 MR. WAGGONER: No objection.

19 DR. HANNAH: No objections.

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21 CHIUSO - GIGLIOTTI - LIOU - MARCHETTI

THE COURT: All right.

(recess taken.)

(Whereupon, the defendants entered the court room.)

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1 THE COURT: All right, bring in the jury.

2 (Whereupon, the jury entered the court room.)

3 THE COURT: Ladies and gentlemen, I have received
4 your note, which has been marked Court exhibit 12, which
5 was delivered to me ten or fifteen minutes after you
6 retired for further deliberations. I want to give you
7 some further instructions which has been reviewed by
8 the attorneys and to which they have no objection.

9 I wish to suggest to you a few thoughts with
10 which you may desire to consider in your deliberations,
11 along with all the other evidence and all the instruc-
12 tions previously given.

13 This is an important case. The trial has been
14 extensive in time, and effort, and money , to both the
15 defense and the prosecution. If you should fail to
16 agree on a verdict, the case is left open and undecided.
17 Like all cases, it must be disposed of some time. There
18 appears no reason to believe that another trial would
19 not be costly to both sides. Nor does there appear
20 any reason to believe the case can be tried again, by
21 either side, better or more exhaustively than it has
22 been tried before you. Any further jury must be sel-
23 ected in the same manner and from the same source as
24 you have been chosen. So, there appears no reason to
25 believe that the case would ever be submitted to twelve

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2 and women more conscientious, more impartial, or more
3 competent to decide it, or that more or clearer evidence
4 could be produced on behalf of either side.

5 Of course these things suggest themselves upon
6 brief reflection, to all of us who have sat through
7 this trial. The only reason they are mentioned now is
8 because some of them may have escaped your attention,
9 which must have been fully occupied up to this time in
10 reviewing the evidence in the case. They are matters
11 which, along with other and perhaps more obvious ones,
12 remind us how desirable it is that you unanimously
13 agreed upon a verdict.

14 As stated in the instructions given at the time
15 the case was submitted to you for decision, you should
16 not surrender your honest convictions as to the weight
17 or effect of evidence, solely because of the opinion
18 of other jurors or for the mere purpose of returning
19 a verdict.

20 However, it is your duty as jurors to consult
21 with one another, and to deliberate with a view to
22 reaching an agreement, if you can do so without violence
23 to individual judgment. Each of you must decide the
24 case for yourself, but you should do so only after a
25 consideration of the evidence in the case with your

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If much the greater number of you are for a conviction, each dissenting juror ought to consider whether a doubt in his or her own mind is a reasonable one, since it makes no effective impression upon the minds of so many other equally honest, equally conscientious fellow jurors, who bear the same responsibility, serve under the same oath, and have heard the same evidence with, we may assume, the same attention and an equal desire to arrive at the truth. On the other hand if a majority or even a lesser number of you are for acquittal, other jurors ought seriously to ask themselves again, and most thoughtfully, whether they do not have reason to doubt the correctness of a judgment,

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Remember, at all times, that no juror is expected to yield a conscientious conviction he or she may have as to the weight or effect of evidence. But remember also that, after full deliberation and consideration of all the evidence in the case, it is your duty to agree upon a verdict, if you can do so without violating your individual judgment and your conscience. Remember, too, if the evidence in the case fails to establish guilt beyond a reasonable doubt, the accused should have your unanimous verdict of "not guilty."

In order to make a decision more practicable, the law imposes the burden of proof on one party or

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the other, in all cases. In the present case, the burden of proof is on the Government.

Above all, keep constantly in mind that unless your final conscientious appraisal of the evidence in the case requires it, the accused should never be exposed to the risk of having to run twice the gauntlet of a criminal prosecution; and to endure a second time the mental, emotional and financial strain of a criminal trial.

You may conduct your deliberations as you choose, but I suggest that you now carefully re-examine and reconsider all the evidence in the case bearing upon the questions before you.

You may be as leisurely in your deliberations as the occasion may require; and you shall take all of the time that you feel is necessary.

You may now retire and continue your deliberations, in such manner as shall be determined by your good and conscientious judgment as reasonable men and women.

I will ask you to retire and deliberate further.

(Whereupon, the jury retired from the court room.)

(Whereupon, the defendants retired from the court room.)

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1 THE COURT: Everybody has their guesses.

2 MR. O'BRIEN: That's right. We are all probably

3 somewhat wrong.

4 THE COURT: Do you gentlemen have any suggestion

5 as to anticipated course of conduct or do we simply

6 wait and see what happens?

7 MR. O'BRIEN: Your Honor, if the jury is still

8 deadlocked, should they send out one more note, I think

9 I will have no alternative but to move for a mistrial.

10 I don't want it, but --

11 THE COURT: No, none of us want a mistrial.

12 There's been too much that has gone into the case. But

13 as I said before, they seem to be wholly deadlocked.

14 There is something more than just an evaluation of the

15 evidence that is going in. We just don't know what it is.

16 MR. O'BRIEN: I would agree.

17 THE COURT: Well, let's see what they do.

18 MR. MARKS: Has lunch been ordered?

19 THE COURT: I beg your pardon?

20 MR. MARKS: Has lunch been ordered for them?

21 THE COURT: No, it has not yet.

22 MR. O'BRIEN: Your Honor, I would ask that lunch

23 be withheld for some period -- I don't mean it that way,

24 but what I am saying is I think if we went in there

25 immediately and started taking their luncheon orders I

1 think they're going to say, "Well, we are going to stay
2 here at least for lunch."

3 THE COURT: On the other hand, if we don't order
4 lunch for them -- if we order it now, according to the
5 Clerk, they wouldn't get it until 1:30, anyway.

6 THE CLERK: Mr. O'Leary, would you concur in that?

7 MR. DEPUTY MARSHALL: Yes.

8 THE COURT: I think we'd better give them the
9 luncheon orders.

10 MR. KANNIVIS: Would your Honor permit for lunch
11 to be brought in for the defendants? My client does
12 not eat pork, some sort of his personal philosophy.

13 THE COURT: We handled that on Friday.

14 MR. DEPUTY MARSHALL: As long as you pick it up
15 and bring it to room 172, you can drop it off.

16 THE COURT: Yes. All right, we will wait for
17 the next note.

18 MR. O'LEARY: Yes, your Honor.

19 (Luncheon recess taken.)

20 (continued next page.)

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1 THE COURT: Gentlemen, we have a note. It has
2 been marked Court Exhibit 13, which says the jury has
3 arrived at a verdict.
4 Would you bring the jury in, please.
5 (The jury entered the courtroom.)
6 THE COURT: Ladies and gentlemen, I understand
7 from your note that you have arrived at a verdict.
8 MADAM FORELADY: Yes.
9 THE COURT: Mr. Clark, will you receive the
10 verdict, please.
11 MR. CLARK: Madam Forelady, will you please
12 state.
13 MADAM FORELADY: Ladies and gentlemen of the jury,
14 have you agreed upon a verdict?
15 MADAM FORELADY: Yes.
16 THE CLERK: Now do you find the defendant, Lamon
17 Floyd, as to Count 1 of the indictment? Guilty or not
18 guilty?
19 MADAM FORELADY: Guilty.
20 THE CLERK: Now do you find the defendant, Peter
21 Olive, as to Count 1 of the indictment?
22 MADAM FORELADY: Guilty.
23 THE CLERK: Now do you find the defendant, Marvin
24 Floyd, as to Count 2 of the indictment?
25 MADAM FORELADY: Guilty.

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1 THE CLERK: How do you find the defendant, Peter
2 Olive, as to Count 2 of the indictment?

3 JUROR NO. 1: Guilty.

4 THE CLERK: Do any you all,

5 THE COURT: Having received your verdict, you, the
6 jury, find the defendant guilty as to both counts? And
7 so say you all.

8 (Thereupon the jurors answered in the affirmative.)

9 MR. O'BRIEN: May the jury be individually polled?

10 THE CLERK: Yes, Mr. Clerk, will you poll the
11 jury individually?

12 THE CLERK: Juror No. 1, is that your verdict?

13 JUROR NO. 1: Yes, it is.

14 THE CLERK: Juror No. 2, is that your verdict?

15 JUROR NO. 2: Yes.

16 THE CLERK: Juror No. 3, is that your verdict?

17 JUROR NO. 3: Yes.

18 THE CLERK: Juror No. 4, is that your verdict?

19 JUROR NO. 4: Yes, sir.

20 THE CLERK: Juror No. 5, is that your verdict?

21 JUROR NO. 5: Yes, sir.

22 THE CLERK: Juror No. 6, is that your verdict?

23 JUROR NO. 6: Yes.

24 THE CLERK: Juror No. 7, is that your verdict?

25 JUROR NO. 7: Yes.

1 THE CLERK: Juror No. 8, is that your verdict?

2 JUROR NO. 8: Yes.

3 THE CLERK: Juror No. 9, is that your verdict?

4 JUROR NO. 9: Yes.

5 THE CLERK: Juror No. 10, is that your verdict?

6 JUROR NO. 10: Yes.

7 THE CLERK: Juror No. 11, is that your verdict?

8 JUROR NO. 11: Yes.

9 THE CLERK: Juror No. 12, is that your verdict?

10 JUROR NO. 12: Yes.

11 THE COURT: So say you all.

12 (Whereupon, the jurors answered in the affirmative.)

13 THE COURT: Ladies and gentlemen, it has been

14 almost six days now. I want to thank you for the time,

15 attention -- and I understand the perspiration in the

16 jury room that you have given to this case. You have

17 concluded your service insofar as this case is concerned.

18 I understand you now must return downstairs to the

19 central jury part. Is that correct?

20 THE CLERK: Yes, your Honor.

21 THE COURT: You have their cards?

22 THE CLERK: I do.

23 Juror No. 1, I'll give you all 12 cards. When

24 you leave the courtroom, give them out.

25 THE COURT: Thank you, ladies and gentleman. You

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